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No. 820

In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. M. LASSING, H. A. THOMPSON, SR., MARSHALL O. THOMPSON, MRS. J. R. HANSON, MRS. RICHARD C. PATRICK, SR., AND H. A. THOMPSON, JR., D/B/A CONSUMERS GASOLINE STATIONS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in this case on December 17, 1960.

OPINIONS BELOW

The decision of the Court of Appeals (Appendix A, *infra*, pp. 13–16) is reported at 284 F. 2d 781. The findings of fact, conclusions of law and order of the Board (J.A. 2a–9a) [1] are reported at 126 NLRB 1041.

[1] References designated "J.A." are to the pages of the joint appendix before the court below, containing portions of the record in this proceeding.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, *infra*, p. 16) was entered on December 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer, who has been found to have closed a department of his business and discharged the employees working there for the purpose of avoiding bargaining with the employees' representatives, may secure reversal of National Labor Relations Board decision finding him guilty of unfair labor practices by pointing to evidence of his belief that the advent of the union would make further operation of the department uneconomical.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The respondent, Consumers Gasoline Stations, is a partnership operating an independent chain of retail gasoline and service stations in Tennessee and Ken-

tucky (J.A. 10a–11a; 57a, 69a). Beginning in August, 1958, and continuing throughout the fall and early winter, the respondent had considered and studied the problem of whether it should continue to truck gasoline particularly in the light of mounting costs and what it deemed to be inadequate equipment (J.A. 12a; 58a–60a, 72a–74a). In December, the repondent decided to adopt a common carrier system of gasoline delivery as soon as anything occurred which would increase costs and, in any event, when the truck licenses expired on April 1, 1959 (J.A. 12a; 58a–59a, 74a).

Sometime during the latter part of 1958, three of the respondent's four drivers—Billy Head, Ned Warren, and Newell Wyatt—became interested in representation by the Union.[2] In mid-December, Wyatt called the Union, and on January 1, 1959, the three drivers signed designation cards which they gave to Ralph Vaughn, a Union business representative (J.A. 13a; 49a). On January 13, Vaughn wrote the respondent, requesting recognition and a meeting for the purpose of negotiating a collective bargaining agreement. The date suggested for such meeting was January 16 (J.A. 13a; 49a, 31a). The respondent promply acknowledged the letter and suggested that the parties get together on January 23 or 26. Finally, January 20 was set as the meeting date (J.A. 13a; 49a, 32a).

Shortly after the respondent received the letter requesting recognition, Office Manager Hanson asked

[2] Teamsters, Chauffeurs, Helpers & Taxicab Drivers Local Union No. 327, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

Wyatt if he knew anything about it. Wyatt replied that he, Warren, and Head had joined the Union. When asked about Joe Savage, the fourth driver, Wyatt told Hanson that he did not think Savage had signed up. During this conversation, Hanson threatened, "We'll sell out to Refiners first" (J.A. 13a, n. 4; 41a).

On January 19, the day before the date scheduled for bargaining to begin, Office Manager Hanson instructed the drivers not to report at their customary starting time the following morning but, instead, to report to the office at 8:30 a.m. When all four drivers arrived at the office on January 20, the respondent gave three of them, Head, Warren, and Wyatt, their separation notices and final checks, and told them that the respondent was going to contract with a common carrier to transport the gasoline (J.A. 14a; 41a, 45a). The three drivers thereupon left and have not since been in the respondent's employ (J.A. 14a; 39a, 44a–45a).

When the Union and the respondent met later that morning, the Union renewed its request for recognition. The respondent refused, announcing that it had for a time contemplated abandoning its method of shipping gas and that the coming of the Union, with the added payroll expense which the respondent anticipated therefrom, was, in effect, the straw that broke the camel's back (J.A. 13a–14a; 68a). The respondent had been paying its drivers $1.30 per hour (J.A. 15a; n. 7). The Board found, on the basis of undisputed testimony, that the Union had contracts with other employers under which the drivers received a similar

rate of pay, and that the Union's wage demands vary and are adapted to local and individual plant conditions (J.A. 17a; 51a, 52a).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon these facts, the Board concluded that the respondent accelerated the change in its method of operation because the drivers had joined the Union, and to avoid its statutory obligation to bargain with the Union. Accordingly the Board held that the respondent violated Section 8(a) (3) and (1) of the Act when, on January 20, it discharged Head, Warren, and Wyatt. The Board also found that, as the Union represented a majority of the drivers prior to the discriminatory dismissals, the repondent was obligated to bargain on request, and its refusal to do so violated Section 8(a)(5) and (1) of the Act (J.A. 3a).

The Board ordered the respondent to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining or coercing employees in the exercise of their statutory rights (J.A. 5a–6a).

In determining what affirmative action would best effectuate the policies of the Act, the Board did not direct reinstatement of the men as truck drivers, recognizing that, prior to the advent of the Union, the respondent had decided to discontinue its trucking operation on April 1, 1959. As the Board was unable to determine from the record whether it was the respondent's policy to offer reassignment to employees dismissed for economic reasons, it left to the compliance stage of the proceeding the ascertainment of the existence of such policy. If reassignment

proved to be the practice, the respondent was directed to offer Head, Warren, and Wyatt the jobs to which they would have been transferred; otherwise the respondent was directed to bargain as to whether these three men might, nevertheless, be employed somewhere in its organization (J.A. 4a–5a, 6a).

Further, the Board's order required the respondent to make Head, Warren, and Wyatt whole for losses suffered as a result of the discrimination against them[3] and to post appropriate notices (J.A. 6a–7a).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals refused to enforce the Board's order, concluding that the respondent's change in operations was made "because of reasonably anticipated increased costs, regardless of whether [the] increased costs [were] caused by the advent of the Union or by some other factor entering into the picture" (*infra*, pp. 15–16). The court also stated that, "Although the Union had made no demand for increased pay, the evidence fully justified respondent's belief that such demands would be made and could not be met. Under the circumstances, we do not believe it was incumbent upon the respondent to delay the effective date of its new method of operation previously decided upon before the advent of the Union" (*infra*, p. 15). Having found that the discharges were nondiscriminatory, the court found that "there was no

[3] Back pay was to run from the date of the discharge to the date reassignment was offered or to April 1, 1959, depending upon whether a reassignment practice existed (J.A. 4a-5a, 6a-7a).

basis for a meeting with the Union later for the purpose of collective bargaining" (*infra*, p. 16).

REASONS FOR GRANTING THE WRIT

1. The question presented by this case is important in the administration of the National Labor Relations Act. The number of cases in which employers seek to justify their action on the ground that it is motivated entirely by economic necessity seems to be increasing. In many situations the action of employers which has the practical effect of frustrating collective bargaining or discriminating against employees who have exercised rights protected by the Act may be judged a normal business decision or an unfair labor practice, depending upon the employer's motives. Obvious examples are changes in working conditions, transfers of activity from one locality to another, or the subcontracting of work which had previously been performed directly. The flexibility and mobility of American industry, except very small business, has made it possible to move plants or to open or close portions of plants in a manner which drastically affects the interests of employees. Whether such action constitutes an infringement of the employee's rights under the National Labor Relations Act or is merely an exercise of managerial discretion, entirely independent of the employer's labor policies, must be determined by the Board by weighing all the evidence with respect to the employer's motives.

The decision below rejects the conclusion of the Board that the employer's decision not to operate its own trucks between January 20 and April 1 was motivated by a determination to avoid collective bar-

gaining and to discriminate against employees who had joined a union. The court rejected this conclusion while leaving untouched the underlying factual findings upon which the conclusion was based. If the decision is viewed merely as a holding with respect to the standard to be followed in judicial review of an administrative finding, it is a sharp departure from the standard of review established by this Court in *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, 488. The National Labor Relations Board's findings were certainly supported by the evidence in the record as a whole, and it was not the function of the reviewing court to "displace the Board's choice between two fairly conflicting views * * *."

The sequence of decisions in the Court of Appeals for the Sixth Circuit, however, makes it appear that that court has in practice adopted a rule of law that it will reverse a finding by the Board of illegal motivation whenever an employer can point to preexisting facts which might have supplied an economic motive for his action. Here, for example, the Board's finding that the subcontracting of the gasoline transport activity was motivated by a desire to avoid bargaining with the representatives chosen by the truck drivers was reversed because the employer had previously decided to subcontract this work at a later date. The court disregarded, as if legally irrelevant, the abundant evidence that the employer advanced the date as soon as he learned that the drivers had joined the union and wished to bargain collectively, evidence which certainly supports the Board's conclusion.

This decision follows earlier Sixth Circuit cases taking the same approach. In *National Labor Rela-*

tions Board v. *R. C. Mahon Co.*, 269 F. 2d 44, the Board found that the employer discriminated against employees and avoided bargaining with their representatives by discharging its plant guards and contracting with an outside agency to perform the service. The court there, as here, reversed the Board's findings on the ground that the action was justified by the need of the employer to effect economies despite the ample evidence before the Board to justify its findings that union activity precipitated the employer's decision. Earlier still, the same court had reversed the Board in a case where the employer had terminated a service department established to maintain its trucks rather than meet a demand for union wages. *National Labor Relations Board* v. *Adkins Transfer Co.*, 226 F. 2d 324. (This case differs from the later ones in that the employer had bargained with the representatives of the employees, so that no question of a Section 8(a)(5) violation was involved.)

2. The decision of the court below is in conflict with the recent action of the Court of Appeals for the Tenth Circuit in *National Labor Relations Board* v. *Brown-Dunkin Co.*, decided January 19, 1961.[4] That case involved a department store's decision to subcontract for janitorial services previously performed by its own employees. The court stated (App. B, *infra*, p. 21):

> * * * The crucial and decisive fact is whether, as the Board found, the work of the employees was subcontracted to another in order to evade the collective bargaining process. The Company may not discontinue a part of an integrated operation merely because the em-

[4] The opinion of that court is reprinted in Appendix B, *infra*, pp. 17–24.

> ployees engaged in the particular unit seek Union representation. In circumstances like these, motivation becomes important, indeed decisive, and, again, permissible inferences from the established facts are crucial. And, as we know, the inference-drawing power is with the Board, and our function is to determine if there is any rational basis for attributing a prohibited motive to the transaction.

See also *National Labor Relations Board* v. *Cape County Milling Co.*, 140 F. 2d 543, 545 (C.A. 8), and *Williams Motor Co.* v. *National Labor Relations Board*, 128 F. 2d 960, 964 (C.A. 8). The importance of this conflict in approach between the two circuits is increased by the fact that two other cases involving similar factual situations are now pending in other courts of appeals. *Yoseph Bag Co.*, 128 NLRB No. 21, petition for review, C.A. 3, Nos. 13358 and 13406; *Jay Foods, Inc.*, 129 NLRB No. 70, petition for review, C.A. 7, No. 13308.[5]

3. Finally, the Board's application of the Act to the facts found was clearly correct. It is not disputed that the Union represented a majority of the truck drivers and had demanded recognition at the time the respondent discontinued the trucking operation. This Court's decision in *Order of Railroad Telegraphers* v. *Chicago & Northwestern R. Co.*, 362 U.S. 330, 342, indicates that the respondent was therefore under a statutory duty to bargain with the Union con-

[5] *National Labor Relations Board* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848 (C.A. 5), is distinguishable, for there, unlike here, there was no finding that the employer had accelerated the shutdown of the operation because of the advent of the union; rather, the finding was that the shutdown had been decided upon previously, and the men had joined the union in an effort to prevent it (at pp. 852–853).

cerning the discontinuance of the work. The respondent, to say the least, put the cart before the horse in discharging the men because it feared the Union's demands, and then cancelling the first bargaining session on the ground that the men the Union represented were no longer the respondent's employees. If the respondent had fulfilled its bargaining obligation under the Act, the discharges need not have occurred, for the respondent might have learned that the Union would follow the practice of adjusting its wage demands to the needs of the employer's business (see p. 5, *supra*), and, in any event, the respondent was still free to decline any wage increase the Union demanded. See *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152, and materials there cited in notes 4 and 5, showing that collective bargaining may lead to a union's abandoning wage demands and even to its accepting wage cuts.

CONCLUSION

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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MARCH 1961.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. M. LASSING, H. A. THOMPSON, SR., MARSHALL O. THOMPSON, MRS. J. R. HANSON, MRS. RICHARD C. PATRICK, SR., AND H. A. THOMPSON, JR., D/B/A CONSUMERS GASOLINE STATIONS, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided December 17, 1960

Before MARTIN, MILLER and WEICK, Circuit Judges.

PER CURIAM. The National Labor Relations Board seeks enforcement of its order of March 8, 1960, based upon its finding that respondent had violated Section 8(a) (1) and (3) of the Act by discharging three employees because they had joined the Union, and had violated Section 8(a) (1) and (5) by refusing thereafter to bargain with the Union.

The respondent is a partnership operating an independent chain of retail gas and service stations in Tennessee and Kentucky. During the latter part of 1958 it had considered and studied the problem of whether it should continue to truck gas with its own equipment and employees, particularly in the light of mounting costs and what it deemed to be inadequate

equipment, and had decided to adopt a common carrier system of gas delivery as soon as anything occurred which would increase costs and, in any event, when the truck licenses expired on April 1, 1959.

On January 1, 1959, three of respondent's drivers joined the Union. The Union requested recognition and a meeting for the purpose of negotiating a collective bargaining agreement. A meeting was arranged for January 20, 1959. On January 19, 1959, the drivers were instructed to report at the respondent's office at 8:30 A.M. When they arrived respondent told them that it was going to contract with a common carrier to transport the gasoline and gave the three drivers herein involved their separation notices and final checks. The three drivers thereupon left and have not since been in respondent's employ.

When the Union and respondent met later that morning, the Union renewed its request for recognition. Respondent refused, announcing that it had for a time contemplated abandoning its method of shipping gas and that the coming of the Union, with the added payroll expense thereby entailed, was, in effect, the straw that broke the camel's back.

This case presents basically the same question considered by this Court and decided adversely to the Board's contention in *N.L.R.B.* v. *Adkins Transfer Co.*, 226 F. (2) 324, C.A. 6th, and *N.L.R.B.* v. *R. C. Mahon Co.*, 269 F. (2) 44, C.A. 6th. We there held that a company may suspend its operations or change its method of doing business, with the resulting loss of employment on the part of certain employees, so long as its change in operations is not motivated by the illegal intention to avoid its obligations under the National Labor Relations Act. A change in operations motivated by financial or economic reasons is not an unfair labor practice under the Act.

The Board contends that this case is not controlled by the ruling in the *Adkins* and *Mahon* cases because the respondent accelerated its proposed change in operations upon its learning that the three employees had joined the Union and before any demands for increased pay for said employees had been made upon it by the Union, and that such action constituted the discrimination found by the Board to exist.

We do not agree. Although the Union had made no demand for increased pay, the evidence fully justified respondent's belief that such demands would be made and could not be met. Under the circumstances we do not believe it was incumbent upon the respondent to delay the effective date of its new method of operation previously decided upon before the advent of the Union. It will be noticed that the respondent's decision to change its method of operation did not include a commitment to continue under its existing method of operations until April 1, 1959. That date fixed the maximum period of time which would elapse before the change would become effective. The respondent had decided to make the change effective before that date if anything occurred which would increase its costs. The advent of the Union was a new economic factor which necessarily had to be evaluated by the respondent as a part of the overall picture pertaining to costs of operation. It is completely unrealistic in the field of business to say that management is acting arbitrarily or unreasonably in changing its method of operations based on reasonably anticipated increased costs, instead of waiting until such increased costs actually materialize.

There is no evidence in the present case, and there is no contention made, that there was any anti-union background on the part of the respondent. Fundamentally, the change was made because of reasonably

anticipated increased costs, regardless of whether this increased costs was caused by the advent of the Union or by some other factor entering into the picture. This did not constitute discrimination against the three employees with respect to their tenure of employment because of membership in the Union, within th provisions of Section 8(a) (1) and (3) of the Act. *N.L.R.B.* v. *Houston Chronicle Pub. Co.*, 211 F. (2) 848, 854, C.A. 5th.

Since that division of the respondent's business was discontinued and the employment of the three drivers legally terminated, there was no basis for a meeting with the Union later for the purpose of collective bargaining. *N.L.R.B.* v. *Houston Chronicle Pub. Co.*, supra.

Enforcement of the Board's order is denied.

JUDGMENT

December 17, 1960

On Petition to enforce an order of the National Labor Relations Board.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, it is now ordered, adjudged and decreed by this Court that Enforcement of the Board's order be and the same is denied.

Approved for entry:

(S) SHACKELFORD MILLER, JR.,
United States Circuit Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Filed: Jan. 19, 1961

January Term—1961

Number 6402

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

BROWN-DUNKIN COMPANY, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before MURRAH, Chief Judge, and BRATTON and BRIETENSTEIN, Circuit Judges.

MURRAH, Chief Judge.

This petition is to enforce an order of the National Labor Relations Board finding the respondent, a large department store in Tulsa, Oklahoma, guilty of unfair labor practices under Sections 8(a) (1), (3) and (5) of the Labor Relations Act. 29 USC § 158(a) (1), (3) and (5). The respondent is clearly engaged in commerce within the scope of the Act and there is no question of jurisdiction.

The basic facts are that in November 1956, three of the Company's operating engineers joined a union. Following this the Company consulted a labor relations firm and subsequently made an arrangement

with an operating-management firm, Anderson-Rooney Company, whereby the latter agreed to take over, on a contract basis, the employment of the engineers and their duties. The respondent Company agreed to pay all costs of labor and materials, as well as a monthly management fee. At the same time, the matter of Anderson-Rooney taking over the janitorial services performed by respondent's maids and porters was also discussed.

Subsequently when the Company learned that the Teamsters Union was conducting a campaign to organize its employees, it again consulted the labor relations firm. The organizational campaign resulted in the NLRB ordering an election among the Company's maids, porters and elevator operators. And these latter employees comprise the employee-unit with which we are concerned.

During the three-week period between the issuance of the election order and the actual voting, the Company carried out an intensive program to convince the employees that they should reject the Union. Various employees testified that the store supervisors told them they were trying to "straighten out the mess the store was in," and that "management never had dealt with the Union and wouldn't have nothing to do with it." They were also promised pay raises and other benefits if the Union was rejected. Despite these Company activities, the Union was successful and was duly certified as the bargaining representative for the unit.

In response to the Board's 8(a)(1) charge and findings, the Company takes the position that these pre-election and pre-certification activities, though persuasive, were not intended to restrain or coerce employees in the exercise of their collective bargaining rights; and that the supporting evidence is "too

insubstantial to establish a transgression of the limits of permissible free speech."

The Company was, indeed, constitutionally and statutorily free to attempt to persuade its employees not to join the Union, provided, of course, such efforts contained "no threat of reprisal or force or promise of benefit." See Section 8(c) of the Act. 29 USC § 158(c). And the fact that the Company's efforts were unavailing is, to be sure, susceptible of an inference of a permissible expression of "views, argument or opinion." Id. But, the fact that the Company's efforts were unsuccessful does not necessarily lead to the conclusion that they were not restrictive or coercive. *N.L.R.B.* v. *Hill & Hill Truck Line*, 266 F. 2d 883. See also *N.L.R.B.* v. *Beatrice Foods Co.*, 183 F. 2d 726; *N.L.R.B.* v. *Fairmont Creamery Co.*, 169 F. 2d 169. In the last analysis, the function of drawing the rather nebulous line between permissible persuasion and prohibited coercive conduct lies within the special competence of the Board which, as we know, is primarily responsible for the effectuation of the purposes of the Act. It is sufficient to say that the record evidence is susceptible of an inference of coercive interference, and we are therefore unable to say that the Board's conclusions in this respect are unwarranted in fact and law. See *N.L.R.B.* v. *Central Oklahoma Milk Producers Association*, — F. 2d — (10 CA 1960).

Shortly after certification, the Union learned that the Company was considering subcontracting the work of these unit employees to Anderson-Rooney. A meeting of the employees was thereupon called, and they voted unanimously to reject employment with Anderson-Rooney, though it would have meant substantial increases in their wages. The reasons for the rejection are not manifest and are apparently im-

material. In any event, despite objections of the employees and the Union, the Company signed a contract with Anderson-Rooney, whereby the latter would assume the work of the unit employees on a cost-plus-fixed-fee basis.

On the day following the signing of the contract, and without notice to the Union, Anderson-Rooney presented the employees printed forms for the purpose of transferring their employment from respondent-company to the management firm. After consulting the Union, the employees signed the forms under protest, apparently because failure to sign would have resulted in immediate discharge. Upon these facts the Board concluded that respondent violated Section 8(a)(3) of the Act by discriminatorily discharging the employees as a reprisal for their Union activities. It also held the Company in violation of Section 8(a)(5) for failing and refusing to afford the Union the opportunity to bargain concerning the terms and conditions of the new employment. The Board accordingly ordered reinstatement of the employees with Brown-Dunkin, provided however, that they could elect to remain with Anderson-Rooney, in view of the latter's higher wages.

The respondent makes the argument that the order is unconventional and prejudicial in that "this is one of the rare cases in which the Board has ordered an employer to engage in a discontinued business operation." It does not appear to us, however, that such is the true consequence of the Board's order. In the first place, the respondent has not abandoned the services of the unit—the employees continue to discharge the same services. But the Company was free to subcontract the employees' work, thereby severing the employer-employee relationship, so long as the subcontracting was not made a subterfuge or

an easy device for evading the statutory obligations to bargain in good faith. The crucial and decisive fact is whether, as the Board found, the work of the employees was subcontracted to another in order to evade the collective bargaining process. The Company may not discontinue a part of an integrated operation merely because the employees engaged in the particular unit seek Union representation.[1] In circumstances like these, motivation becomes important, indeed decisive, and, again, permissible inferences from the established facts are crucial. And, as we know, the inference-drawing power is with the Board and our function is to determine if there is any rational basis for attributing a prohibited motive to the transaction.

The respondent maintains that the employees were discharged for legitimate reasons. It contends that Anderson-Rooney was contracted because it could perform the same work more economically. It may be assumed that economy is a legitimate reason for good faith subcontracting. But even so, the Board justifiably concluded that the Anderson-Rooney contract did in fact increase the cost of this part of the re-

[1] See *Williams Motor Co.* v. *N.L.R.B.*, 128 F. 2d 960, 964; *N.L.R.B.* v. *Bank of America*, 130 F. 2d 624, 629, cert. denied, 318 U.S. 791; *Butler Bros.* v. *N.L.R.B.*, 134 F. 2d 981, 985, cert. denied, 320 U.S. 789; *N.L.R.B.* v. *Cape County Milling Co.*, 140 F. 2d 543, 546; *N.L.R.B.* v. *Missouri Transit Co.*, 250 F. 2d 261, 262. Cf. *N.L.R.B.* v. *R. C. Mahon Co.*, 269 F. 2d 44, 47 and *N.L.R.B.* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848, 851, where the discontinuance of a part of the business was not prompted by an intention to avoid the Act, but resulted from legitimate business motives. And Cf. *United Steelworkers of America* v. *New Park Mining Co.*, 273 F. 2d 352, wherein the question under Section 301 of the Act was whether subcontracting was a prohibited device for evading the obligations of a consummated collective bargaining contract.

spondent's operations, due to the substantial wage increase as well as the management fee.

The Company also asserts that plans to subcontract to Anderson-Rooney were formulated long before the Union election and therefore cannot be considered violative of the Act. But, the Board held "On this record there can be no question that the successful unionization of these employees precipitated the broadening of the Anderson-Rooney contract, which already covered operating engineers, to include cleaning and elevator personnel, and the discharge by respondent of all employees in the certified unit." This finding is supported by substantial evidence to the effect that even though the contract relating to the operating engineers was in existence prior to the labor difficulties, the successful Union election prompted the discharge of these unit employees in violation of the Act. And discharge for Union activities is the very substance of discriminatory practices prohibited by Section 8(a)(3) of the Act. We conclude that the Board's findings in this regard are factually and legally justified.

The contention is also made that the respondent did not deny the Union the right to bargain concerning the terms and conditions of employment in violation of Section 8(a)(5). The unassailed facts are, however, to the contrary. While the Union appears to have had some intimation of the impending Anderson-Rooney contract, it was not until the morning of the effective date of the contract that the Union learned it had been consummated. And this information was obtained through the employees, not the employer. Under no stretch of the imagination can it be said that these circumstances gave the Union a fair opportunity to bargain with respondent about not subcontracting the work, or with Anderson-Rooney

concerning the conditions of the new employment. This is not to say that the Union must first approve before an employer may contract out work, but it is to say that reasonable notice and a chance to bargain must be afforded before an employer enters into a contract affecting the hire or tenure of its Union workers' employment. This is so because "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *May Dept. Stores* v. *N.L.R.B.*, 326 U.S. 376, 385. See also *N.L.R.B.* v. *Crompton-Highland Mills*, 337 U.S. 217; *N.L.R.B.* v. *Burton-Dixie Corp.*, 210 F. 2d 199.

The Company's final two contentions are basically matters of procedure. It asserts (1) that the Board's complaint is insufficient because it names some, but not all, of the unit employees and therefore the order cannot issue in favor of the unnamed employees; and (2) that the order is ambiguous and unclear. The essence of the first argument is that in its complaint, the Board named only those employees who had voted in favor of Union representation and omitted those who were in favor of rejecting it. The omission, however, is immaterial because in pertinent parts of the complaint it is specified that all of the employees in the unit were discharged by respondent in violation of the Act. It would be an incongruity and a technical nicety to hold, at this late date, that a part of the unit employees were not included in the complaint when the pleading clearly described the unit and stated that all of the employees therein were treated unfairly. See *N.L.R.B.* v. *Somerset Classics*, 193 F. 2d 613.

The second contention is based upon provisions in the Board's order granting the employees the option to remain with Anderson-Rooney, or be reinstated by Brown-Dunkin. In effect, the choice is between higher wages paid by Anderson-Rooney and purportedly greater job security provided by Brown-Dunkin. But we find nothing inconsistent or arbitrary in the flexibility of the Board's order. Its form and scope is a matter for the Board to mold to the particular facts and circumstances in each case. It is not for us to interfere with this discretionary function in the absence of a showing of clear abuse.

The order will be enforced.

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